United Nations AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1066

Case No. 1166: RAGAN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, First Vice-President, presiding; Mr. Kevin Haugh, Second Vice-President; Mr. Spyridon Flogaitis;

Whereas, on 14 November 2000, Kristi Ragan, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an Application containing pleas which read, in part, as follows:

"II. PLEAS

...

8. Procedurally, the Applicant respectfully requests the Administrative Tribunal

(a) ... [T]o ... order that all outstanding documentary evidence ... be made available to the Applicant ...

(b) [T]o undertake an expedited hearing of this [Application]. ...

(c) On the merits, the Applicant respectfully requests the Tribunal to find:

that the ... Discipinary Committee [(DC)] committed errors of fact and law in its proceedings in the Applicant's case

...

(d) that the Administration denied the Applicant due process in the launching, investigation and presentation of and decision making on the case, leading to her wrongful punitive dismissal ...

9. Whereafter the Applicant most respectfully requests the Administrative Tribunal to order:

(a) that the Applicant be retroactively reinstated;

or failing that:

(b) the payment of compensation of her full salary and benefits for the period between her termination from UNDP and the Tribunal decision; payment of her separation on the terms that were in place within UNDP at the time of the Applicant's termination; $40,000 for the reimbursement of costs incurred by the Applicant in preparing her case for the Administration and the [DC]; two years net base salary as compensation for the psychological stress suffered ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 December 2000 and periodically thereafter until 31 December 2001;

Whereas the Respondent filed his Answer on 31 October 2001;

Whereas the Applicant filed Written Observations on 25 January 2002;

Whereas on 8 May 2002, the Applicant requested oral proceedings;

Whereas, also on 8 May 2002, the Applicant reiterated her request for production of documents and, on 23 May 2002, the Respondent submitted the said documents to the Tribunal;

Whereas, on 8 July 2002, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNDP as a Management Trainee at the P-2 level, on a two-year fixed-term appointment, on 21 August 1989. At the time of the events that gave rise to the present Application, the Applicant was serving as Assistant Resident Representative (Programme) at the P-3/4 level, in Suva, Fiji.

From 10 November 1990 to February 1994, when the Applicant was stationed in Fiji, she was paid a rental subsidy in respect of her residence, a houseboat, based upon a rental agreement dated 10 November 1990, and an undated "Amendment to Lease" signed and submitted to UNDP by the Applicant. The original lease was for a three-year period from 10 November 1990 to 9 November 1993, at a monthly rental of F$ 1,500 for the first year, with the rent to be reviewed subsequently and established in accordance with prevailing market prices. The amendment to the lease specified the rent for the last three years of the four-year

term, namely, F$ 1,700 for the second year, F$ 1,900 for the third year, and F$ 2,100 for the fourth year.

On 1 November 1991, the Applicant signed a purchase agreement with her landlord and landlady, the Lessors/Vendors, for the same houseboat.

On 23 March 1998, the Office of Audit and Performance Review, UNDP, (OAPR) wrote to the Applicant, advising her that during a routine management audit of the UNDP office in Fiji in February 1998, the Regional Audit Service Asia and Pacific Region Centre (RASC), had found irregularities in her applications for rental subsidy and requesting her comments. The Applicant responded on 1 May 1998, stating that she had had "absolutely no intent" to circumvent the UNDP rules regarding rental subsidies, that she had made a rent-to-own agreement with the Lessors/Vendors and that she had not officially purchased the houseboat until November 1994.

On 9 October 1998, OAPR issued a strictly confidential report. It found that the Applicant's comments lacked evidence and were not confirmed by the parties concerned, citing a "series of transactions which did not correspond with the rental subsidy claims submitted by [Applicant]". It concluded as follows:

> "6.4.a) It appears that the two applications of rental subsidy submitted by [the Applicant] on 18 November 1991 and 30 December 1992 were fraudulent in that they were made for an owned dwelling but supported by a document indicating that the property is under a lease agreement; and,
>
> 6.4.b) the first application of rental subsidy ... is questionable due to:
>
> 6.4.b.i) the inconsistency between the monthly rent in the lease agreement and the payments acknowledged in the sale agreement by both the staff and the [Lessors/Vendors] as being made for the period of November 1990 to October 199[1]; and,
>
> 6.4.b.ii) the apparent collusion between the staff member and the [landlord] as demonstrated by the latter's signature of an amendment to the lease after the sale had been concluded and the ownership transferred to the staff member."

OAPR recommended that the apparent fraudulent applications of rental subsidy made by the Applicant on 30 November 1990, 18 November 1991 and 30 December 1992 warranted disciplinary action and a financial recovery of $16,232.51, and that, pending the completion of the disciplinary process, her administrative and financial authorities be suspended.

On 5 February 1999, the Applicant was sent a copy of the Special Audit Report and invited to comment. The Applicant submitted a statement dated 1 April 1999, prepared by her former landlord, apparently at her behest. In this statement, the landlord indicated, contrary to his earlier statement to the RASC, that the Applicant and her husband had leased the premises from him and his wife and had paid a monthly rent, partly in cash and partly by check. In her comments dated 15 April 1999, the Applicant explained the difference between the monthly rental claimed by her for rental subsidy purposes, and the amount of the actual payments made by cheque to the landlord, as having been paid to workmen for maintenance work for the entire four year period of her occupancy. The Applicant also stated that although she had initially entered into an agreement to purchase the houseboat on 1 November 1991, she had orally and unilaterally revoked that agreement when she learned that she would not be entitled to rental subsidy on an owned dwelling.

On 2 December 1999 Applicant was charged with misconduct. She was advised that the matter would be submitted to the DC; of her rights; and, invited to comment.

On 12 June 2000, the DC submitted its report. Its conclusions and recommendation read as follows:

> "VI. CONCLUSIONS AND RECOMMENDATION
>
> 40. It is the Committee's conclusion that [the Applicant] was not entitled to the rental subsidy she claimed while in Fiji for any period after 31 October 1991, as subsequent to that date she was the owner and not the renter of the premises for which she had obtained the subsidy. Accordingly, recovery of such monies would be justified under the Financial Rules. With respect to the subsidy claimed and paid to her for the earlier period November 1990 to November 1991, for which the evidence was not conclusive, the Committee can only observe that ... it is incumbent upon staff members to reveal in documented form any arrangement which varies from that which is presented as the basis of obtaining entitlements. There is no evidence to this effect in the case of the staff member.
>
> 41. Accordingly, it is the Committee's conclusion that the staff member's failure to comply with the applicable standards constitutes misconduct within the terms of the Staff Regulations and Rules.
>
> 42. It is the unanimous recommendation of the Committee that [the Applicant] be demoted one grade and that she not be eligible for consideration for promotion before having served the minimum time in the lower grade."

On 11 August 2000, the Administrator, UNDP, transmitted a copy of the DC report to the Applicant, and advised her as follows:

"...

After a complete review of the Committee's report, I agree with its findings, and that [the] violations, committed over a number of years, constitute misconduct, and are in breach of the integrity requirement of the UN Charter article 101.3. Considering that the Committee has found no circumstances which could mitigate the seriousness of your misconduct, I have decided that continuation of your services would not be in the best interest of UNDP. Consequently, ... in accordance with staff regulation 10.2, ... you are dismissed from service with three months salary in lieu of notice, without any termination benefits. I have also ordered that the losses suffered by the Organization in this case be recovered from you, and you will be contacted by the Bureau of Management in this regard.

..."

On 14 November 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The DC, in its deliberations, committed errors of fact and law.

2. The Applicant maintains that she nullified the 1991 agreement and remained in a tenant-landlord relationship, albeit on a rent-to-own basis.

3. The Applicant's rights of due process were violated.

Whereas the Respondent's principal contentions are:

1. The decision to dismiss the Applicant was not vitiated by conflict of interest, prejudice, improper motivation, or other extraneous factor, on the part of the Respondent.

2. The Applicant was accorded all the protections of due process.

The Tribunal, having deliberated from 8 to 26 July 2002, now pronounces the following Judgement:

I. In the opinion of this Tribunal, the evidence adduced before the DC to establish that the Applicant and her family had since 1 November 1991 occupied the houseboat "Toad Hall" under and by virtue of the Purchase Agreement of that date, rather than as tenants under the Lease or Rental Agreement dated 10 November, 1990 or its undated amendment was very strong. Some would describe it as being virtually compelling.

The documentary evidence as to the payments made by the Applicant to CD (male) and to his spouse CH (female) hereafter referred to as "the Lessors/Vendors", mirrored or accorded with the Applicant's obligations under the Purchase Agreement and differed significantly from what her obligations would have been under the said Lease of 10 November, 1990 and/or the undated "Amendment to Lease" and the Applicant was unable to produce any satisfactory or any documentary evidence of payments to workmen on a monthly or other regular basis for work done in repairing, improving or maintaining the houseboat, so that (as was her allegation) she effectively made up or matched the rent allegedly payable under the Lease and its Amendment, which said documents had been furnished by her in support of her Application for Rent Subsidy Payments.

II. In the view of the Tribunal, the sale or transfer of the mooring registration to the Applicant and her husband on 19 November 1991 again strongly supported the contention that they had purchased the houseboat and were making phased payments, rather than that they reverted to the status of tenants. Further, the nature of the insurance on the houseboat effected by the Applicant's husband in February 1994 likewise, in the opinion of the Tribunal, strongly supported the suggestion that he then had an insurable interest in the hull, rather than the case that it was then being occupied by the Applicant's family as tenants, under the Lease Agreement or its Amendment. In short, in the view of the Tribunal, the documentary evidence which was not seriously undermined or contradicted by other varying independent or acceptable evidence, leads inexorably to the only conclusion that the said Purchase Agreement had superseded the Lease and the Tribunal is satisfied that there was abundant evidence before the DC to justify its findings, in that regard.

III. The Tribunal further sees ample justification in the DC's disinterest in taking oral evidence from CD, the first named Lessor/Vendor. There were irreconcilable differences between the contents of the first statement he had signed for the Administration and the later Statutory Declarations he had executed for the Applicant. The transcript of the recorded telephone conversation with him, combined with the contradictory statements, in the view of the Tribunal fully justified the DC's conclusion that he was a wholly unreliable witness and accordingly their decision not to rely on his evidence or recollections one way or the other, so as to justify such findings as it might make in the course of its investigations was fully appropriate. The Tribunal, consequently, rejects the contention that by virtue of the nature of

the documents, that the contents of the Statutory Declarations ought to have been preferred as against the statement which he had signed for the Administration and which he had later claimed had been made or signed under pressure.

The Purchase Agreement had provided for a payment by the Applicant and her husband of F$ 28,800 to the Lessors/Vendors on the execution thereof and for further payments of F$ 8,000 and F$ 7,600 on 1 March and 1 May 1992 respectively, in addition to the monthly payment of initially F$ 1,000 rising to F$ 1,200 until November 1994.

The Applicant's bank documents established payment of each and every one of those amounts. The Applicant sought to explain these substantial lumpsum payments over and above the monthly payments as payments which were made to the Vendors/Lessors which she made in effect to keep them well-disposed, so that they would continue to rent the houseboat to the Applicant and her family rather than sell it to somebody else. At least this is the Tribunal's understanding of what she meant when she stated "*[b]etween November 1991 and May 1992 the Applicant made three payments to the landlord in addition to her monthly rent in order to provide him with security against the tenant's sudden departure/reassignment since he held no security deposit and to provide formal claim by the Applicant to the verbal option to own*". Suffice it to say that the Tribunal is not at all surprised that this explanation was rejected by the DC as, in the view of the Tribunal, it beggars belief and is just simply incredible. The Tribunal is satisfied that the only reasonable inference which could be taken from those payments was that the Applicant had remained in possession under the Purchase Agreement, that it had not been revoked or nullified by her as she alleges and that those payments were made by her pursuant to the terms of the said Purchase Agreement.

IV. As to the Applicant's fall back or secondary argument, the Applicant had submitted to the DC and submits to this Tribunal that in the event of the Applicant's evidence that she had repudiated or nullified the Purchase Agreement being rejected or if it is ruled that her repudiation was not legally effective so that she remained in occupation under the Purchase Agreement rather than reverted back to the status of a tenant, then nonetheless she would have been entitled to a rental subsidy from the Respondent as the Purchase Agreement did not purport to pass title in the houseboat to the Applicant and her husband until November 1994 (and then only provided that all payments were made thereunder) so that in law she should have been considered until November 1994 as having been paying rent with an option to purchase. She accordingly claims that if this was her true position, she would have been

entitled to a rental subsidy, albeit perhaps in a different amount to the amount calculated on the basis of the documents submitted in furtherance of her claim.

In the view of the Tribunal this submission is irrelevant to the real issues here. The complaint was one of misconduct arising from falsely claiming that she occupied the houseboat under the Lease and its undated Amendment; i.e., that she and her husband occupied the houseboat as tenants paying rent, and not a claim that she was acquiring ownership under a Purchase Agreement. In support of her claims for rental subsidy she had submitted the Lease and the undated Amendment of Lease and had neither submitted the Purchase Agreement or made any reference thereto in support of her said claim. Accordingly, no claim for rental subsidy had ever been made by her based either on the existence of the Purchase Agreement or based on the sums payable or paid by her thereunder. Thus, the Tribunal is satisfied that it is totally irrelevant whether or not she would have had a claim for entitlement to a rental subsidy arising from the payments made under the Purchase Agreement as no such claim had ever been advanced. Such a claim would have been altogether different from the rental subsidy claim which she actually made, being the claim for rental subsidy based on the obligations under the Lease and its Amendment. The misconduct alleged against her arose from the falsity of the claim actually submitted by her and the Tribunal is satisfied that there was ample evidence before the DC to justify its finding that a false claim for rental subsidy had been made by the Applicant.

V. A myriad of complaints have been made in this Application in relation to the manner in which the DC went about its business and of a denial by the DC to the Applicant of due process. The Tribunal is satisfied that none of these complaints have been substantiated. As to the Applicant's claim that there has been an infringement of the rule against double jeopardy, the Tribunal is satisfied that this claim must likewise be rejected. It arose because the Administration had sought an adjournment of the proceedings before the DC seeking extra time to consider evidence and documents which had been submitted by the Applicant. The DC in effect granted the adjournment but saw fit to express it as deeming the Administration to have withdrawn the complaint unless and until it was ready and desirous of proceeding with same. It is clear to the Tribunal that what was intended by the DC was to grant a postponement or an adjournment until such time as the Administration had decided if it would proceed, and if it did, until the Administration would be ready to proceed, and its order could not be considered in any way to have been an adjudication of the merits of the

complaint in favour of the Applicant. It therefore cannot be said that when the Administration decided to proceed with the matter which had in effect been adjourned that this had put the Applicant in double jeopardy. A different question might have arisen had the complaint been resolved in favour of the Applicant and had the Administration then sought to have it investigated yet again. This was not the case here. The Tribunal uses the words "might have" advisedly, as it is doubtful if the concept of double jeopardy has any place in jurisprudence relating to an employment investigation of this sort, but the Tribunal considers it appropriate to leave the issue open for now, lest it is appropriate that it should be better considered should a suitable case arise in the future.

VI. The Applicant has sought information and various documents relating to a dispute which arose between the Secretary and the Members of the DC in relation to the manner in which the investigations and deliberations of the DC had taken place and the manner in which the report of the DC had been finalised and agreed.

Whilst the Respondent submits that those documents are irrelevant to the issues arising in these proceedings and are of no relevance to the Applicant, arguing that they have no bearing on the nature of the Applicant's occupancy of the houseboat, it nonetheless decided to make the documents available to the Tribunal and the Applicant, in the interests of transparency and full disclosure. As is apparent from the report of the DC, it is a document signed by all Members without dissent. It is therefore a unanimous report of the DC. On reviewing the papers the Tribunal is satisfied that nothing emerges from the dispute or from the papers furnished in relation to the dispute which impugns the validity of the said DC report. The dispute related in the main to the powers and functions of the Secretary and her allegations that the Members of the DC or at least a Member thereof was biased or improperly disposed in favour of the Applicant. Had that allegation been borne out (which it was not) this could hardly have been called in aid by the Applicant for her complaint is that the findings which the DC made against her were unjustified rather than a complaint that she had been treated with undue favouritism or undue leniency by the DC. In any event the Tribunal considers that this spat between the Secretary of the DC and its Members is totally irrelevant to the validity of the report, that its validity has not been impugned and that the Respondent was entitled to rely on the DC's findings of misconduct on reconsideration of the appropriate disciplinary measures to be imposed.

VII. Finally the Tribunal has considered the Applicant's complaint that her dismissal was too harsh and disproportionate having regard to the findings and recommendations of the DC. The Tribunal repeats yet again that the functions of a DC in relation to punishment or sanction are advisory and that the Administration has a wide discretion as to the nature of sanction or penalty to be imposed in disciplinary cases. In the view of the Tribunal the misconduct found against the Applicant by the DC and accepted by the Respondent was of a serious nature. The Applicant had falsified the nature of her claim and concealed from the Administration some highly relevant documentation, in particular, the Purchase Agreement. In the opinion of the Tribunal the only plausible explanation for this concealment was what she had given by way of explanation for having allegedly repudiated or nullified the Purchase Agreement, namely her belief that its existence would have disentitled her from receiving a rental subsidy. In the circumstances the Tribunal is not satisfied that the dismissal was disproportionate or was so severe as should be interfered with by an order of the Tribunal.

VIII. In view of the foregoing, the Application is rejected in its entirety.

(Signatures)

Julio BARBOZA
First Vice-President, presiding

Kevin HAUGH
SecondVice-President

Spyridon FLOGAITIS
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary